Supreme Court, U.S.
FILED

No. 95-230 JUL 24 1995

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOYCE L. WALMER,
Petitioner

v.

UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether Petitioner's Equal Protection Clause challenge to the Army's policy excluding homosexuals presents questions going to the merits so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation.

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4. Order, denying petition for rehearing and suggestion for rehearing in banc, Walmer v. U.S. Dep't. of Defense and Dep't. of the Army, No. 93-3377, (10th Cir. Apr. 25, 1995)

Jurisdictional Grounds

A. The Tenth Circuit Judgment sought to be reviewed was entered April 4, 1995.

B. The Tenth Circuit denied Appellant's Petition for Rehearing and Appellant's Suggestion for Rehearing In Banc by Order entered April 25, 1995. The Tenth Circuit denied Appellant's Motion for Stay of Mandate by Order filed May 2, 1995.

Pursuant to Sup. Ct. Rule 13.4, the time for filing this Petition for Writ of Certiorari began to run on April 25, 1995, the date of the denial of the Petition for Rehearing.

C. Statutory jurisdiction is conveyed upon this Court pursuant to 28 U.S.C. 1254(1).

This Court should exercise its discretionary jurisdiction on this matter because the 10th Circuit Judgment rendered in this matter is in disagreement and confusion with the 9th Circuit's decision on the same matter in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991).

In addition, jurisdiction is properly in this Court because the 10th Circuit Judgment sought to be reviewed decided an important question of federal law which has not been, but should be settled by this Court.

Constitutional Provisions, Statutes and Regulations Involved

A. United States Constitution:

(1) First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ar abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

B. Statutes:

(1) 28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(2) 28 U.S.C. §2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under Section 7428 of the Internal Revenue Code of 1986, a proceeding under Section 505 or 1146 of Title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of

merchandise of a free trade area country (as defined in Section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see Section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

(3) 28 U.S.C. §1291

The courts of appeals (other than the United States court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

(4) 28 U.S.C. §1292(a)

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands,or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(5) 28 U.S.C. §1294

Except as provided in Sections 1292 (c), 1292 (d), and 1295 of this title, appeals from reviewable decisions of the district and

territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

(6) 28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(a) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

(b) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give

binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

C. Regulations:

(1) Fed. R. Civ. P. 62(c)

Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party....

(2) Army Regulation 635-100

The basis for separation may include preservice, prior service, or current service conduct or statements. an officer shall be separated under the provisions of this section if one of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that --

(1) Such conduct is a departure from the officer's usual and customary behavior.

(2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the officer during a period of military service.

(4) Under the particular circumstances of the case, the officer's continued presence in the service as an officer of the Army is consistent with the interest of the Army in proper discipline, good order, and morale.

(5) The officer does not desire to engage in or intend to engage in homosexual acts.

b. The officer has stated that he or she is a homosexual or bisexual unless there is a further finding that the officer is not a homosexual or bisexual.

c. The officer has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the officer is not a homosexual or bisexual (e.g., where the purpose of the marriage or attempt to marry was the avoidance or termination of military service.

Statement of Factual Case

Original Basis for Federal Jurisdiction.

Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 2201. Further jurisdiction was based upon Article I, Section 9 of the U.S. Constitution, and the First and Fifth Amendments to the U.S. Constitution. Jurisdiction in the 10th Circuit was invoked pursuant to 28 U.S.C. §§ 1291, 1292(a) and 1294.

Statement of Facts

1. Procedural History:

On January 14, 1993, Petitioner moved the U.S. District Court of Kansas for a preliminary injunction of her discharge from the United States Army, asserting, among other reasons, that the Army's decision to discharge her based upon a finding that she had committed acts of homosexuality was in violation of the U.S. Constitution. Specifically, Petitioner argued that AR 35-100, the Army regulation invoked in her Board of Inquiry hearing, impermissibly discriminates against homosexuals in violation of the Equal Protection requirements of the Fifth Amendment.

On October 15, 1993, the District Court denied Petitioner's Motion. Walmer v. U.S. Dep't of Defense and Dep't of the Army, No. 93-2015 (D. Kan. Oct. 15, 1993). The District Court rejected Petitioner's Equal Protection

Argument, and held that Petitioner had not met the fourth prong necessary for a preliminary injunction which requires a showing of "substantial likelihood" of success on the merits. Id., slip op. at 9-10.

The District Court correctly stated the 10th Circuit's modified interpretation of the "likelihood of success" argument. Id.[1] However, the District Court determined that the 10th Circuit's decision in Rich v. Sec. of the Army, 735 F.2d 1220 (1984), was binding precedent under which Major Walmer's Equal Protection claims could not prevail. In Rich, the 10th Circuit held that the military's classification of soldiers based upon their choice of sexual partners was not suspect, and that the military's policy excluding homosexual's from service was "valid in light of the Army's demonstration of a compelling governmental interest in maintaining the discipline and morale of the armed forces." 735 F.2d at 1229.

In a Judgment entered April 4, 1995, the 10th Circuit agreed with the District Court

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[1]In City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310, 314 (10th Cir. 1980), the court held that if the first three requirements for a preliminary injunction are satisfied, then the movant can establish the fourth requirement by merely showing questions going to the merits so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving or more deliberate investigation.

that there were no questions so serious, substantial, difficult and doubtful as to make the issues ripe for litigation, and affirmed the lower court's denial of Petitioner's motion for a preliminary injunction. Walmer v. U.S. Dep't of Defense and Dep't of the Army, No. 93-2015 (D. Kan. Oct. 15, 1993). The 10th Circuit refused to modify its decision in Rich, and refused to address the apparent conflict between the Rich decision and the 9th Circuit's decision in Pruitt v. Cheney, 963 F.2d 1160, 1164-66 (9th Cir. 1991)(the Army's policy excluding homosexual's from service could not be held rational as a matter of pure law; court must actively review the record to see whether the government has established on the record a rational basis for the challenged discrimination).

2. Facts:

The underlying facts of this case are relatively straight forward and undisputed.

Major Joyce Walmer was selected to attend the Command and General Staff Officer Course at Ft. Leavenworth, Kansas. Only the top 10% of each branch and year group are selected to attend this college. Major Walmer was the only female in her staff group of 16 officers. At CGSOC, Major Walmer continued to demonstrate the characteristics that marked her career. Judge O'Connor of the U.S. District Court, in his Memorandum and Order summarized: "Throughout her 13 year military career, her immediate superiors have

recognized plaintiff as 'one of the best', 'a superb leader' and 'the epitome of a commander.' No. 92-2015, slip op. at 1, supra.

While at CGSOC an individual who at one time had been befriended by Major Walmer, and who had a personal vendetta against Major Walmer contacted the Criminal Investigation Command (CID) with the purpose of destroying Major Walmer's career. (Complaint; App. at pp.). CID conducted an investigation into the allegations pursuant to Army Regulation 635-100, paragraph 5-16. (Complaint; App. at pp.). As a result of the investigation, Lieutenant General Shoffner, the Commanding General at Ft. Leavenworth, initiated discharge proceedings against Major Walmer.

On July 20, 1992, Major Walmer appeared before a U.S. Army Board of Inquiry. Major Walmer signed a Stipulation of Fact stating that she had in the past engaged in homosexual acts with the individual initiating the CID investigation and that the criteria in Army Regulation 635-100, paragraph 5-51, were not applicable to her case. (Complaint; App. at pp.). The Board of Inquiry recommended discharge because of homosexuality with the issuance of an honorable discharge. (App. at p. 52).

It should be noted that the testimony at the Board of Inquiry indicated that there was no other evidence that Major Walmer had engaged in homosexual acts either prior or

after the allegations. No evidence was presented that under all of the circumstances that any conduct was likely to recur. No evidence was presented that this conduct was accomplished by the use of force, coercion or intimidation. In fact, much of the evidence presented demonstrated that Walmer's continued presence in the military was consistent with the interest of the Army in proper discipline, order and morale. (Complaint; App. at p. 15). Nevertheless, the Board of Inquiry announced that:

A. Based upon the evidence presented at this hearing, you did admit acts of homosexuality; and,

B. Based upon the findings, the Board recommends: Elimination because of homosexuality with the issuance of an honorable discharge certificate. (App. at p. 52).

On December 31, 1992, Major Walmer was formally notified that her separation date was January 14, 1993. Just hours before her scheduled discharge on January 14, 1993, Major Walmer filed her Complaint in the U.S. District Court of Kansas along with a Motion for a Temporary Restraining Order and Preliminary Injunction. The District Court granted Major Walmer's Motion for a T.R.O. and temporarily restrained the government from discharging the her. On August 27, 1993, the matter came before the District Court on Plaintiff's Motion for Preliminary Injunction.

Argument

Major Walmer was discharged under the Army's policy excluding homosexuals from service, which was in effect prior to the recent adoption of the so called "don't ask, don't tell" policy. Major Walmer's equal protection challenge concerns the old policy, and the arguments advanced herein do not challenge the constitutional validity of the "don't ask, don't tell" policy.

Procedurally, this case is before this Court to determine whether or not the district court properly denied Major Walmer's request for a preliminary injunction prohibiting the Army from discharging her pending the trial on the merits of her Complaint. In order to obtain a preliminary injunction, Major Walmer must establish:

(1) that she will suffer irreparable injury unless the injunction issues;

(2) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party;

(3) the injunction, if issued, would not be adverse to the public interest; and

(4) there is a substantial likelihood that the moving party will succeed on the merits.

See Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

In City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310, 314 (10th Cir. 1985), the court held that if the first three requirements for a preliminary injunction are satisfied, then the movant can establish the fourth requirement -- likelihood of success -- by merely showing questions going to the merits so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation.

In this case, the district court erroneously found that Major Walmer could not meet the fourth requirement for preliminary injunction. Because the court believed the fourth element could not be met, the court did not address or discuss whether Major Walmer had met the first three requirements.

This case presents the following serious, substantial, and difficult questions, which have either been decided inconsistently by the circuit courts of appeal, or present issues of national importance which can only be decided by this Court:

A. Is the "rational-basis" test the appropriate level of scrutiny to be applied in Major Walmer's equal protection challenge to the Army's policy excluding homosexuals from service?

B. If the "rational-basis" test is the appropriate test to be applied, is the Army's policy excluding homosexuals from service rational as a matter of pure law?

C. If the Army's policy excluding homosexuals from service is not rational as a matter of pure law, what is the appropriate procedure the district court should follow in order to determine constitutional challenge to the policy?

Each of the above questions will be addressed in the order in which they have been presented.

A. Is the "rational-basis" test the appropriate level of scrutiny to be applied in Major Walmer's equal protection challenge to the Army's policy excluding homosexuals from service?

This Court has previously applied three different levels of scrutiny to decide equal protection challenges to legislation or government policy. Statutes which classify on the basis of race, alienage, or national origin are subjected to strict scrutiny, and will be sustained only if they are tailored to serve a compelling state interest. Palmore v. Sidoti, 466 U.S. 429, 432-33, 80 L. Ed.2d 421, 104 S.Ct. 1879 (1984).

Statutes which classify on the basis of gender or illegitimacy are subject to a heightened standard of review, because these

characteristics frequently bear no relation to ability to perform or contribute to society. Frontiero v. Richardson, 411 U.S. 677, 678, 36 L. Ed.2d 583, 93 S.Ct. 1164 (1973); Matthews v. Lucas 427 U.S. 495, 505, 49 L. Ed.2d 651, 96 S.Ct. 2755 (1976). These classifications require a substantial relationship to a legitimate state interest in order to survive equal protection scrutiny. Mills v. Habluetzel, 456 U.S. 91, 99, 71 L. Ed.2d 770, 102 S.Ct. 1549 (1982).

All other classifications are presumed valid, and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. Schweiker v. Wilson, 450 U.S. 221, 230, 67 L. Ed.2d 186, 101 S.Ct. 1074 (1981).

The policy under which Major Walmer was discharged from the Army classifies soldiers on the basis of sexual orientation. Homosexuals are excluded from military service. Major Walmer has challenged the constitutionality of this classification, which raised the question concerning the level of scrutiny to be applied to the policy at issue.

The 10th Circuit in Rich v. Sec. of the Army, 735 F.2d 1220, 1229 (1984) refused to apply the intermediate level of scrutiny to the military's policy excluding homosexuals, holding that "[a] classification based on one's choice of sexual partners is not suspect." The court in Rich offered no real analysis for this conclusion. Major Walmer

contends that this conclusion is suspect and in error.

The justification for applying the intermediate level of scrutiny to classifications based upon gender and illegitimacy is based primarily on the fact that these characteristics generally provide no sensible ground for different treatment, and frequently bear no relation to the ability to perform or contribute to society. Cleburne v. Cleburne Living Center, 479 U.S. 432, 440-41, 87 L. Ed.2d 313, 105 S.Ct. 3249 (1985).

In the present case, there is no relationship between one's sexual orientation and the ability to perform and function as a soldier. The fact that a soldier may be homosexual in no way impairs or impedes that soldier's ability to fire a weapon, operate heavy or high tech machinery, lead troops into battle, or any other duty that soldiers are required to perform in service to their country. Indeed, in the present case, Judge O'Connor found that Major Walmer was rated in the top 25 percent of the Army, and appeared to be an outstanding military officer. No credible evidence exists to demonstrate that homosexuals are inherently unable to perform or contribute to the Army.

The arguments traditionally advanced in support of the military's policy excluding homosexuals from service have focused on the impact the mere presence of homosexuals might have on unit cohesion, morale and discipline.

Although these arguments may be advanced in an effort to defeat an equal protection challenge to the policy, Major Walmer would emphasize that these are arguments that do not impact the question of whether homosexuals are entitled to the intermediate level of scrutiny. For purposes of identifying the appropriate level of scrutiny to be applied to the equal protection challenge, the focus should be on the question of whether homosexuality has any relation to the ability of a homosexual to perform or contribute to the armed forces. The clear answer to this question is no.

Although homosexuals have traditionally not been held to be a quasi-suspect class entitled to an intermediate level of scrutiny for purposes of equal protection, this tradition is not supported by clear thinking and should be ended. Homosexuals are entitled to the heightened scrutiny standard. Major Walmer is entitled to this standard. The district court should apply this standard to decide the merits of Major Walmer's equal protection challenge to the Army's policy excluding homosexuals from service.

B. <u>If the "rational-basis" test is the appropriate test to be applied, is the Army's policy excluding homosexuals from service rational as a matter of pure law?</u>

If this Court should determine that Major Walmer is not entitled to the intermediate level of scrutiny, serious and profound

questions exist as to the application of the rational-basis test.

The approach taken by the 10th Circuit in Rich strongly suggests that the Army's policy excluding homosexuals from service is rational, as a matter of pure law. The Rich court made the conclusory determination that the Army's classification "is valid in light of the Army's demonstration of a compelling governmental interest in maintaining the discipline and morale of the armed forces." Rich, 632 F.2d at 810. The court declined to make any inquiry into the question of whether the classification is rationally related to the government interest it was designed to achieve.

The 9th Circuit has taken a different approach to the rational basis analysis. In Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992), a former Army reserve officer challenged the Army's homosexual exclusion policy on equal protection and other grounds. The court rejected the Army's contention that its policy is rational as a matter of pure law. Id. at 1166. Instead, the court stated that it must actively review the record "to see whether the government [has] established on the record a rational basis for the challenged discrimination." Id. According to the Pruitt court, a court may not simply accept without question the government's proffered justifications for its policy as presumptively valid, but must determine whether the proffered

justifications are motivated by constitutionally impermissible prejudice. Id. at 1166-67.

In the present case, the government argued at the district court level that this Court's decision in Heller v. Doe, 509 U.S. ___, 125 L. Ed.2d 257, 113 S.Ct. ___ (1993), had resolved the apparent conflict. Major Walmer respectfully suggests that the Heller decision clarified somewhat the issues surrounding the rational basis test, but did not resolve them.

In Heller, this Court was asked to decide an equal protection challenge to Kentucky statutes dealing with the commitment procedures for mentally retarded and mentally ill individuals. Although there were various similarities in the statutes in question, there were substantial differences involving disparate burdens of proof to be applied to the commitment proceedings, and the ability of family members to participate as parties to the proceedings. 125 L. Ed.2d at 267.

This Court applied the rational basis test to determine the equal protection challenge. This Court started from the premise that the classifications drawn by the Kentucky legislature were to be accorded "a strong presumption of validity." 125 L. Ed.2d at 270. So long as there was a "rational relationship between the disparity of treatment and some legitimate governmental

purpose", the equal protection clause was not offended. 125 L. Ed.2d at 270.

The Court stated:

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' [Citations omitted.] A statute is presumed constitutional [citation omitted], and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' [citation omitted] whether or not the basis has a foundation in the record." 125 L. Ed.2d at 271.

In the Court's application of the rational basis test to the challenged Kentucky statutes, the Court found that "Kentucky has proffered more than adequate justifications for the differences in treatment between the mentally retarded and mentally ill." 125 L. Ed.2d at 271. This Court then went to great lengths to analyze each of the proffered justifications, and concluded that the classification was constitutional. 125 L. Ed.2d 271-77.

In the present case, the government has argued that the conflict between 9th Circuit's rational basis approach in Pruitt and the 10th Circuit's approach in Rich has been resolved

in favor of the Rich approach by the Court's decision in Heller. According to the government, Heller stands for the proposition that the Army merely has to articulate a rational basis for its policy, which the district court must then accept, as a matter of pure law, as constitutional. Major Walmer disagrees with the government's interpretation of the Heller decision.

The ambiguities that still exist in the application of the rational basis test to constitutional challenges to the military's policy excluding homosexuals after Heller were clearly articulated by two district judges in the 9th Circuit in Dahl v. Secretary of the Navy, 830 F.Supp. 1319 (E.D. Cal. 1993) and Cammermeyer v. Aspin, 850 F.Supp. 910 (W.D. Wash 1994).

In Dahl, a sailor challenged his discharge from the Navy based upon his admission that he was a homosexual as being in violation of the equal protection clause, among other things. 830 F.Supp. at 1321. The district court granted the government's motion to dismiss. Id. The sailor appealed, and the 9th Circuit Court of Appeals, relying on the Pruitt decision, reversed and remanded the case back to the district court. Id.

The government argued on remand that the Pruitt decision was no longer good law in light of the Court's decision in Heller. Id. at 1325. The government argued that Heller

required only that it present a basis for the policy on the record. Id. at 1326.

The district court, however, noted that Heller only overruled Pruitt to the extent that the Pruitt decision implied that the burden was on the policy-maker to persuade the court that the policy at issue possesses a rational basis. Id. The court stated that Heller "cannot reasonably be construed to mean that, once evidence is proffered, the court has no responsibility under Rule 56 to analyze whether there is a triable issue of material fact as to the policy's rationality." Id. The court noted that the Heller Court considered each justification proffered by Kentucky in support of the challenged legislation to determine if the classifications at issue were rationally based. Id. at 1327. The court concluded that "there is no support for the . . . argument that the court must accept without question the . . . proffered bases for the homosexual exclusion policy without analyzing the relevant evidence and determining whether the policy is motivated by prejudice against homosexuals." Id.

In Cammermeyer v. Aspin, cited above, Cammermeyer, an officer in the National Guard, challenged her discharge from service based upon her admission that she was a lesbian. 850 F.Supp. at 912. Cammermeyer argued that the homosexual exclusion policy was unconstitutional on equal protection grounds, among other things. Id. The government moved

for summary judgement, which was denied by the district court.

In discussing the application of the rational basis review to the equal protection challenge, the court correctly noted that rational basis review is a two step process:

"Initially, the court must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose. A discriminatory classification that is based on prejudice or bias is not rational as a matter of law." Id. at 915.

During oral argument, the government contended that under the Heller decision, no review of the rational basis for the Army regulation is necessary because "we are completely free to rely on rational speculation unsupported by empirical data or evidence." Id. at 917, fn.8. The court flatly rejected this argument.

In its analysis of the Heller decision, the court affirmed its obligation to determine whether a rational basis for the policy exists:

"While it is true that, under Heller, the government policymaker is not required to submit evidence to justify its policy, and may

offer only 'rational speculation' to explain the discriminating classification, the Court remains obligated to determine whether there is a rational basis for the policy. Otherwise, it would not have been necessary for the Heller [C]ourt to examine the assumptions underlying the Kentucky statute. If the Government's position were correct, the Heller Court could have simply upheld the statute as a matter of law, without any inquiry into its rationality. In fact, the Heller Court closely examined the State's asserted bases for the differential treatment of the two classes and found that there were plausible rationales for each of the statutory distinctions challenged in the case." Id. at 917.

Moreover, the court noted that policies based solely on prejudice will never survive the rational basis review, and that the Heller Court did not address the proper scope of a court's rational basis review where a policy is alleged to be based solely on prejudice. Id., citing Cleburne, 473 U.S. at 450.

Courts have historically been troubled by a military's former policy, which applies to Major Walmer, that discriminates against individuals on the basis of sexual orientation. See, generally, Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986). In fact, one court questioned whether these regulations that discriminate against homosexuals are merely "a smoke screen hiding personal antipathies or moral judgments."

Norton v. Macy, 417 F.2d 1161, 1167 (D.C. Cir. 1969). As noted by the Court in Cleburne, "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Cleburne at 448.

In the present case, serious, substantial and fundamental questions still exist as to the proper application of the rational basis test to Major Walmer's equal protection challenge to the Army's homosexual exclusion policy. Can the district court simply find the Army's policy to be rational as a matter of pure law as the government suggests? Or must the court inquire into the justifications proffered by the Army to determine if the policy is rationally related to the justifications proffered?

These questions must be addressed and answered by this Court. If the district court in this case is required to find, as a matter of pure law, that the Army's policy is rational simply because the Army concludes the policy is necessary to achieve order, discipline and morale, then the policy is inherently beyond any constitutional challenge. However, in cases where the court has analyzed the justifications proffered, the policy was found to be based solely on prejudice and unrelated to the goals the policy was to achieve.

In this case, the prejudice of the Army Regulation is overwhelmingly present. The

purpose of the Regulation is to ensure discipline, excellence, and morale. The facial application of this regulation will, however, destroy the career of a military officer who exemplified and continues to exemplify those very qualities. Clearly, this policy discriminates against Major Walmer and caters to the prejudice of certain individuals in the military. See Paul Siegel, Second Hand Prejudice, Racial Analogies and Shared Showers: Why Don't Ask, Don't Tell" Won't Sell, 9 Notre Dame J.L. Ethics & Pub. Pol'y 185 (1995). The policy results in an impermissible punishment of status. See Francisco Valdes, Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct, 27 Creighton L. Rev. 381 (1994).

C. If the Army's policy excluding homosexuals from service is not rational as a matter of pure law, what is the appropriate procedure the district court should follow in order to determine constitutional challenge to the policy?

It is clear that the burden is on the attacking party to negate every conceivable basis which might support a policy at issue. Heller, 125 L. Ed.2d at 271. It is also clear that the policy-maker has no obligation to introduce evidence in support of the policy, and may rely on "rational speculation unsupported by evidence or empirical data." Id. What is not clear is how the district court, mechanically, should apply the rational

basis analysis to an equal protection question, and the scope of the court's analysis when the attacking party alleges that the policy in question is based solely on prejudice.

Although the burden is on the challenging party, that party's burden is to negate each and every basis for the policy in question. Does this then put a burden on the defending party to first proffer all justifications for the policy in question that are said to be rationally related to the policy? Or must the attacking party speculate as to these justifications and then offer evidence that said justifications, which may or may not be proffered by the defending party, are not rationally related to the policy?

The policy-maker need offer no evidence in support of the proffered justifications. What is the evidentiary burden the attacking party must meet in order to show that the policy is based solely on prejudice? If the attacking party enters into the record clear and convincing evidence that the policy is based solely on prejudice, and no evidence is offered on behalf of the policy-maker, has the attacking party carried its burden of proof? Is the attacking party required to make an evidentiary showing beyond clear and convincing evidence?

These are the practical considerations that face Major Walmer as she prepares to prosecute her Complaint against Army. They

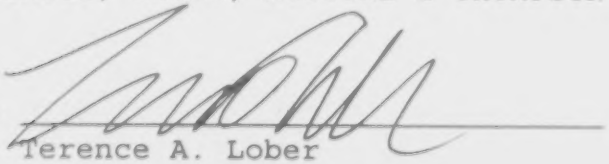
are the same questions that every other soldier, discharged from the military under the former policy excluding homosexuals, must face as well. This Court should clarify these issues.

Conclusion

Whether or not the military's policy to discharge homosexuals violates the Equal Protection Clause is, for reasons stated above, an important question of federal law which has not been, and should be, settled by this Court. The 10th Circuit's judgment that such an issue presents no serious, substantial, difficult or doubtful questions is in error and ripe for review by this Court.

Dated: July 24, 1995

DAVIS, BEALL, McGUIRE & THOMPSON

By: 

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Attorneys for Petitioner
Joyce L. Walmer

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FINDINGS AND RECOMMENDATIONS WORK SHEET

Board of Inquiry
Directed by
Commander, U.S. Army Combined Arms
Command and Fort Leavenworth
In the Case of
Joyce L. Walmer, MAJ,
U.S. Army, MP, 127-46-6199

(Note: President must read verbatim) MAJ Joyce L. Walmer, this Board of Inquiry, by majority vote and secret written ballot in closed session, enters the following findings and recommendations:

a. Based upon the evidence presented at the hearing:

(1) You (did) ~~(did not)~~ commit act(s) of homosexuality.

b. Based upon the above findings, the Board recommends:

(1) Retention (with) (without) reassignment;

(2) Elimination because of homosexuality with the issuance of a(n) (honorable) ~~(general under honorable conditions)~~ discharge certificate.

/s/ Richard L. Gibson
RICHARD L. GIBSON
COL, U.S. Army
President

Date: 20 Jul 92 Govt. Ex. No. 13

****

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOYCE L. WALMER,	)	FILED
	)	Oct 15, 1993
Plaintiff	)	Ralph L.
	)	DeLoach,
v.	)	Clerk
	)	
UNITED STATES DEPARTMENT	)	CIVIL ACTION
OF DEFENSE AND	)	No. 93-2015-EEO
DEPARTMENT OF THE ARMY,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

On August 27, 1993, the above captioned matter came before the court on plaintiff's motion for preliminary injunction (Doc. #19). After carefully considering the arguments and briefs of the respective parties, the court makes the following findings of fact and

conclusions of law as required by Federal Rule of Civil Procedure 52(a).

The relevant facts are not in dispute. Plaintiff is a female officer in the United States Army. After serving in the Reserve Officer Training Corps in college, she was commissioned a second lieutenant in the Military Police Corps in 1979. Plaintiff has been in the United States Army from 1979 through the present. She has served in a variety of assignments and has been promoted through the years. Her current rank is major. Throughout her thirteen-year military career, her immediate superiors have recognized plaintiff as "one of the best," "a superb leader," and "the epitome of a commander." At the time of the discharge proceedings at issue, plaintiff was rated in the top 25 percent of the Army. Based upon the record before this court, plaintiff appears to be an outstanding military officer.

In January 1992, an alleged former homosexual lover of plaintiff's inform ed the Army that plaintiff was a homosexual, and had been involved in a homosexual relationship with her while plaintiff was in the Army. The Army's Criminal Investigation Division conducted an investigation into the allegations pursuant to Army Regulation ("AR") 635-100 i 5-16.

As a result of this investigation, Lieutenant General Shoffner, the Commanding General at Fort Leavenworth, initiated

discharge proceedings against plaintiff. In his memorandum directed to plaintiff, General Shoffner informed plaintiff that she was "required to show cause for retention on active duty under the provisions for [sic] paragraph 5-11a(6) and (8), AR 635-100 because of misconduct, moral or professional dereliction." The memorandum also informed plaintiff:

This action is based on the following specific reasons for elimination:

a. Acts of personal misconduct. Specifically, between 1983 and 1991, you engaged in homosexual acts with a Pamela [sic] S. O'Brien. Further, you married Pamela [sic] S. O'Brien, a person then known to be a person of the same biological sex as yourself, on or about 25 December 1983. The investigation report documenting this misconduct is enclosed.

b. Acts of personal misconduct. Specifically, you used marihuana on several occasions between 1983 and 1990.

c. Conduct unbecoming an officer, as evidenced by paragraph 2a and 2b, above.

Plaintiff was advised of her rights under AR 635-1001 including the right to submit her resignation or request discharge in lieu of elimination, and her right to submit a rebuttal and request an appearance before a

Board of Inquiry ("BOI") in lieu of resignation or discharge.

Plaintiff elected to appear before a BOI. During the BOI proceedings, plaintiff was represented by both military and civilian counsel and was present at all stages of the proceedings. The government presented its case through stipulations of fact and expected testimony. Each of the stipulations submitted by the government was reviewed and signed by the plaintiff, her civilian and military counsel, and the government's representative.

In Government Exhibit #9, "Stipulation of Fact," plaintiff acknowledged the truth of the following facts:

> 1. That on 12 January 1992, Pamala O'Brien reported to the Army that MAJ Joyce L. Walmer and Pamala O'Brien had engaged in a homosexual relationship. MAJ Joyce L. Walmer admits that she has in the past engaged in homosexual acts with Ms. O'Brien.
>
> * * * *
>
> 3. That MAJ Joyce L. Walmer does not satisfy the criteria in paragraphs 5-51a(1) through (5), AR 635-1001 and is not entitled to an exception to the mandatory separation of an officer for homosexual acts as set out in the cited paragraph and paragraph 5-56, AR 635-100.

* * * *

5. That Ms. O'Brien made other allegations of misconduct as mentioned in the initiation of the elimination memorandum. However, there is no evidence presented regarding these other allegations, these other allegations were not referred to this Board, and will play no part in these proceedings.

In paragraph three of the Stipulation of Fact, plaintiff specifically acknowledged that none of the exceptions to the military policy requiring discharge of homosexuals applied to her.

During the hearing, prior to the admission into evidence of Government Exhibit #9, the president of the BOI determined on the record that plaintiff had read and discussed with her counsel the stipulation prior to signing it and that she desired to enter into the stipulation; Plaintiff told the president she knew that by signing the document she was admitting she had performed homosexual acts and that the BOI would be required to recommend a discharge pursuant to AR 635-100, ¶ 5-56.

AR 635-100, ¶ 5-51 provides:

The basis for separation may include preservice, prior service, or current service conduct or statements. An

officer shall be separated under the provisions of this section if one of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that --

(1) Such conduct is a departure from the officer's usual and customary behavior.

(2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the officer during a period of military service.

(4) Under the particular circumstances of the case, the officer's continued presence in the service as an officer of the Army is consistent with the interest of the Army in proper discipline, good order, and morale.

(5) The officer does not desire to engage in or intend to engage in homosexual acts.

b. The officer has stated that he or she is a homosexual or bisexual unless there is a further finding that the officer is not a homosexual or bisexual.

c. The officer has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the officer is not a homosexual or bisexual (e.g., where the purpose of the marriage or attempt to marry was the avoidance or termination of military service).

At the conclusion of the hearing, on July 20, 1992, the president of the BOI announced the following Findings and Recommendations:

A. Based upon the evidence presented at this hearing, you did commit acts of homosexuality; and,

B. Based upon the findings, the Board recommends: Elimination because of homosexuality with the issuance of an honorable discharge certificate.

On December 3, 1992, a Board of Review ("BOR") reviewed the BOI's action and recommended plaintiff be eliminated from the Army with an honorable discharge. On December 22, 1992, the Office of the Secretary of the Army reviewed and approved the BOI's

recommendation. Plaintiff's scheduled date for discharge was January 14, 1993.

On January 14, 1993, just hours before her scheduled discharge, plaintiff filed this action along with a motion for a temporary restraining order. This court granted plaintiff's motion and temporarily restrained the government from discharging plaintiff. After a series of extensions of the restraining order, the parties requested a stay of proceedings until July 31, 1993. The parties are now before the court on plaintiff's motion for preliminary injunction.

In her brief, plaintiff advances several arguments in support of her motion for preliminary injunction. First, she contends that the discharge procedure employed by the Army violated certain procedural requirements of the Administrative Procedure Act, 5 U.S.C. S 702 et seq. Plaintiff's counsel conceded, however, during oral argument, that she had abandoned this contention and was no longer advancing this claim. The court, therefore, will not consider this argument.

Next, plaintiff asserts that the Army discharged her in violation of the United States Constitution. Specifically, plaintiff maintains that AR 635-100 impermissibly discriminates against homosexuals in violation of the equal protection requirements of the Fifth Amendment to the United States Constitution, and that AR 635-100 is an unconstitutional bill of attainder.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants initially contend that this court need not consider plaintiff's claims on the merits because plaintiff has made no attempt to appeal her discharge to the Army Board for Correction of Military Records ("ABCMR"). Thus, defendants maintain, plaintiff has failed to exhaust her administrative remedies. In our view, defendants' position is not persuasive. Plaintiff initially sought redress for the complaints she makes in this lawsuit with the BOI, but to no avail. Her complaint was then forwarded to the General Officer Show Cause Authority ("GOSCA"), which reviewed the case for procedural defects. GOSCA then forwarded the file though channels to personnel command where it was again reviewed for substantial procedural defects. Next, continuing to pursue her administrative remedies, plaintiff sought review of the BOI decision by the BOR, but again to no avail.

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), provides a general statement of a court's authority to review military decisions:

> [A] court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of

available intraservice corrective measures.

Mindes, 453 F.2d at 201. The Fifth Circuit, however, has noted four circumstances in which exhaustion is not required: (1) if the remedies do not provide an opportunity for adequate relief; (2) if the petitioner will suffer irreparable harm if compelled to seek administrative relief; (3) if administrative appeal would be futile; or (4) if substantial constitutional questions are raised. Von Hoffburg v. Alexander, 615 F.2d 633, 638 (5th Cir. 1980). In Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974), the court explained:

> [E]xhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile. For example, a plaintiff obviously need not appeal to the particular DRB or BCMR if the relief requested is not within the authority of those bodies to grant.

Hodges, 499 F.2d at 420-21 (footnotes omitted).

In the case at bar, the defendants admitted in oral argument that the ABCMR does not have authority, except on an as applied basis, to hold a military policy unconstitutional, and that in fact, it is impermissible for the ABCMR to strike down a military policy on its face. AR 635-100 makes discharge of Army officer personnel mandatory upon a finding of

homosexuality, and therefore exhaustion of administrative remedies would be futile. The law does not require a citizen to take futile acts. The court finds that plaintiff made good faith efforts to pursue relief through the appropriate governmental agencies and has effectively exhausted all possible avenues in which her requested relief might have been granted.

Moreover, because plaintiff is asserting a claim based upon constitutional grounds, she need not pursue any further administrative remedies . See Von Hoffburg, 615 F.2d at 638. constitutional issues are issues singularly suited to a judicial forum and clearly inappropriate for an administrative board. Plaintiff indicated in oral argument that she has abandoned her procedural defects claims and is only relying on the merits of her constitutional claims. Plaintiff's abandonment of her procedural defects claims undermines defendants' argument that requiring review by the ABCMR would enable the ABCMR to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors."

REQUIREMENTS FOR PRELIMINARY INJUNCTION

We now turn to the merits of plaintiff's motion for injunctive relief. "The function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties." Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). For

this court to issue a preliminary injunction, the moving party must establish that:

(1) the moving party will suffer irreparable injury unless the injunction issues;

(2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party;

(3) the injunction, if issued, would not be adverse to the public interest;

(4) there is substantial likelihood that the moving party succeed on the merits.

See Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

The Tenth Circuit has adopted a modified interpretation of the "likelihood of success" requirement. In City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310 (10th Cir. 1985), the court held that if the first three requirements for a preliminary injunction are satisfied, then the movant can establish the fourth requirement, likelihood of success, by merely showing questions going to the merits so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation. City of Chanute, 754 F.2d at 314.

Plaintiff suggests she will likely succeed on the merits of her complaint. She maintains that AR 635-100 impermissibly discriminates against homosexuals in violation of the equal protection requirements of the Fifth Amendment to the United States Constitution, and that AR 635-100 is an unlawful bill of attainder as applied to homosexuals.

Because we have concluded that plaintiff has failed to establish that there is substantial likelihood that she will succeed on the merits even under this circuit's modified interpretation, City of Chanute, supra, the first three require-ments necessary to warrant preliminary injunctive relief need not be discussed.

EQUAL PROTECTION

Plaintiff contends that the Army's regulation prohibiting homosexuals from service in the Army violates the equal protection clause of the United States Constitution. First, plaintiff urges that this court should hold that homosexuals are a quasi-suspect class entitled to an intermediate level of scrutiny. Under the intermediate standard, a classification will not be upheld unless it has a "substantial relationship" to an important" government interest. The Supreme Court has applied this intermediate level of scrutiny in cases involving classifications based upon gender, Craig v. Boren, 429 U.S. 190 (1977), and

illegitimacy, Clark v. Jeter, 486 U.S. 456 (1988).

Additionally, plaintiff argues if intermediate scrutiny is not appropriate, this court should apply the active rationale basis approach enunciated in Pruitt v. Cheney, 963 F.2d 1160, (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992), because the Army regulation directs the discharge of service members based upon their status as homosexuals, as opposed to their conduct as homosexuals.

In Pruitt, a former Army reserve officer challenged the Army's homosexual exclusion policy on equal protection and other grounds. The district court dismissed the plaintiff's claim, stating that the Army's determination that homosexual personnel are incompatible with its military mission is entitled to substantial deference.

On appeal, the Army urged affirmance because "its right to discharge homosexual servicepersons is so firmly supported in the law that any equal protection claim that Pruitt has asserted . . . is legally insufficient on its face." Id. at 1164. The Ninth Circuit rejected this argument, holding that the Army's policy could not be held as a pure matter of law. Id. at 1166. Rather, the court, relying upon City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), stated a court must actively review the record "see whether the government has established on the record a rational basis for

the challenged discrimination." Id. at 1166 (emphasis in original). Cleburne involved an equal protection challenge to a local zoning ordinance requiring a special use permit for a group home for the mentally retarded. There, the Supreme Court held that the record did not "reveal any rational basis for believing that the [home for the mentally retarded] would pose any special threat to the city's legitimate interest . . ." Id. at 448.

In Pruitt, the Ninth Circuit inferred from Cleburne that upon a plaintiff's showing of discrimination, a court may not simply accept the government's proffered justifications for its policy as presumptively valid, but must determine whether these justifications are motivated by constitutionally impermissible prejudice against the class at issue. The court reversed the district court's judgement of dismissal as to the plaintiff's equal protection claim, and remanded with directions requiring the Army to establish a factual record in support of its contention that its homosexual exclusion policy was rationally related to a permissible governmental purpose. Id. at 1166-67.

Here, plaintiff argues that, in light of Pruitt, the Army must establish on the record that its regulation is rationally related to a permissible governmental purpose and that the regulation does not simply give effect to society's prejudices. She claims that factual and empirical data will demonstrate there is no rational basis for the policy. AT a trial

on the merits, plaintiff argues that she will seek to admit into evidence numerous reports, including the 1989 report of the Defense Personnel Security Research and Education Center ('PERSEREC") entitled Nonconforming Sexual Orientations and Military Suitability. This report, commissioned by the Pentagon and conducted by the Defense Department, concluded that the job performance of homosexual men and women as a group is no different from that of heterosexual men and women. Plaintiff also refers to the 1957 Crittendon report, officially known as the Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals, and the recent Rand Study, released in August 1993. The Crittendon report stated that there was no "visible supporting data [to support the conclusion that gays and lesbians] cannot acceptably serve in the military." Crittendon Report, p. 5. Plaintiff reasons that because the Army cannot establish through a factual record a rationale basis for its policy, such policy must be based wholly on societal prejudice and thus violates the constitutional guarantee of equal protection.

Defendants dispute plaintiff's characterization of the active rational basis test. Defendants argue that the active rational basis standard in Pruitt, which purports to place the burden on the policymaker to provide more than recitation of the rationale for the policy on the record,

has been called into question by the recent United States Supreme Court case Heller v. Doe, ___ U.S. ___, 113 S. Ct. 2637 (1993). Defendants contend that the burden is on the person challenging the policy to negate every conceivable rationale basis for its policy, the government need only advance any rational basis for its policy and need not submit evidence in support thereof on the record. Further, defendants argue that plaintiff's attempt to employ an "active rational basis" standard is simply foreclosed by Tenth Circuit precedent, specifically the Tenth Circuit's holding in Rich v. Sec. of the Army, 735 F.2d 1220 (1984).

In Rich, the Army honorably discharged a serviceman for fraudulent enlistment when it learned that, in the enlistment process, the serviceman falsely represented that he was not a homosexual. The serviceman sued, seeking damages and injunctive and declaratory relief. The district court upheld the Army's action. In affirming the lower court's decision, the Tenth Circuit stated:

> Plaintiff contends that the Army's policy of excluding homosexuals violates his rights under the equal protection component of the Fifth Amendment due process clause because homosexuality is an immutable characteristic which must be evaluated under the strict scrutiny standard of review. Furthermore plaintiff says that even if we do not agree that homo-

sexuality is a suspect classification, there is nevertheless an equal protection violation because the Army has not met its burden of justifying discrimination against homosexuals.

We cannot agree. A classification based on one's choice of sexual partners is not suspect. E.g., National Gay Task Force v. Board of Education, 729 F.2d 1270, 1273 (10th Cir. 1984); see also Hatheway v. Secretary of Army, 641 F.2d 1376, 1382 (9th Cir. 1981), cert. denied, 454 U.S. 864, 102 S.Ct. 324, 70 L.Ed.2d 164 (1981); DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979). And even if heightened scrutiny were required in reviewing the Army Regulations because they restrict a fundamental right, see, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 254, 262, 94 S.Ct. 1076, 1080, 1084, 39 L.Ed.2d. 306 (1974); Shaoiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d. 600 (1969); Hatheway v. Secretary of Army, supra, 641 F.2d at 1382 n. 6 (9th Cir. 1981) the classification is valid in light of the Army's demonstration of a compelling governmental interest in maintaining the discipline and morale of the armed forces. Hatheway, supra, 641 F.2d at 1382; Beller, supra, 632 F.2d at 810. Thus, we cannot sustain the plaintiff's equal protection claim.

Rich, 735 F.2d at 1229 (footnote omitted).

The court refused to apply the strict scrutiny standard, finding that homosexuality is not a suspect classification. The court held that even if heightened scrutiny were required, the regulations prohibiting homosexuals from service were nonetheless valid in that they satisfied a compelling governmental interest in maintaining the discipline and morale of the armed forces.

Consequently, whether we should apply the active rational basis test or the traditional rational basis test need not be decided. Under either test, plaintiff cannot prevail because of Tenth Circuit precedent, which is binding on this court. This seems consistent with the court's earlier expression that "[t]he composition of the armed forces is a matter for Congress and the military. " Lindenau v. Alexander, 663 F.2d 68, 73 (10th Cir. 1981), citing Gilligan v. Morgan, 413 U.S. 1 (1972). Moreover, this circuit only recently adhered to its earlier view that classifications which disparately affect homosexuals receive only a rationale basis review. Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993).

Neither of plaintiff's briefs mentions Rich. During oral argument, however, in response to the court's questioning, plaintiff's counsel stated that Rich is no longer good law in light of Palmore v. Sidoti, 466 U.S. 429 (1984). She claims the court did

not have the opportunity to consider Palmore in deciding Rich. Actually, Palmore was decided several months before the Tenth Circuit decided Rich, and over eight years before Jantz. Furthermore, Palmore involved an equal protection claim in a child custody case wherein the court applied strict scrutiny, because of a suspect racial classification. Thus, plaintiff's suggestion that Rich is no longer good law lacks substance.

Other circuits have upheld the military's policy regarding homosexuals. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454 , 464 (7th Cir. 1989) , cert. denied, 494 U.S. 1004 (1990) (rational basis scrutiny applied to equal protection challenge of Army regulation: "[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) ("After [Bowers v.] Hardwick, [478 U.S. 186 (1986)] it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); Dronenburg v. Zech, 741 F.2d 1388 1398 (D.C. Cir. 1984) (Navy policy requiring discharge for homosexual conduct is a rational means of achieving the legitimate government interests which include the maintenance of discipline, good order and morale, mutual trust among

servicemembers, and insuring the integrity of the system of rank and command.

We conclude that plaintiff's equal protection argument must be rejected.

BILL OF ATTAINDER

Plaintiff next asserts that the military's policy as codified in AR 635-100 constitutes a bill of attainder proscribed by Article I, Section 9, of the United States Constitution. Article I, Section 9, provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of [sic] the protections of a judicial trial." Nixon v. Administrator, Gen. Servs., 433 U.S. 425, 468 (1977). Plaintiff claims the military's policy on homosexuality is a bill of attainder because the regulation designates homosexuals as a group and punishes homosexuals, by discharging them, for belonging to the group.

The constitutional prohibitions against bills of attainder apply only to acts of legislatures, and not to acts of administrative agencies. In Marshall v. Sawyer, 365 F.2d 105 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967), the Nevada Gaming commission adopted a regulation that prohibited gambling casinos from "[c]atering to . . . persons of notorious or unsavory reputations, or who have extensive police

records." 365 F.2d at 107. To implement this regulation, the Commission published a "black book" listing certain individuals, including Marshall, as individuals who came within the purview of the regulation. Marshall argued that the regulation constituted a bill of attainder. In rejecting this claim, the court stated:

> As generally understood, a bill of attainder is an act of a legislative body that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.
>
> Marshall points to a passing comment by Justice Black in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, as implying that an act by an administrative or executive branch of government may constitute a bill of attainder. We do not regard the language relied upon as authority for thus expanding what appellant himself concedes to be the traditional role of a bill of attainder.
>
> Assuming, without deciding, that the black book and accompanying letter are, in other respects, in the nature of bills of attainder, the fact that they were not legislative acts deprives

them of status as bills of attainder in the constitutional sense.

365 F.2d at 111 (citations omitted; emphasis supplied). See also Garner v. Bd. of Public Works, 341 U.S. 716 (1951); U.S. v. Lovett, 328 U.S. 303 (1945).

The military's policy on homosexuality is not a legislative act, but rather a compilation of Army Regulations implementing Department of Defense Directives. Specifically, AR 635-100 implements DOD Directive 1332.30. In her brief, plaintiff attempts to rebut this distinction by asserting: "the courts have applied bill of attainder analysis to regulations by administrative agencies. See Hudson v. United States, 766 F.2d 1288 (9th Cir. 1985) (concerning IRS regulation); Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986) (concerning U.S. Army regulation)." These cases do not support plaintiff's position. In Hudson, the court rejected the plaintiff's claim that 26 U.S.C. § 6702, a provision of the Internal Revenue Code, was a bill of attainder. 766 F.2d at 1292. Alberico specifically held that the amendment to an Army regulation did not constitute a bill of attainder. 783 F.2d at 1028.

We conclude that, as the military policy in question is not a legislative act, it does not meet the definition of a bill of attainder.

Moreover, the court is of the opinion that even if the military policy could be construed as a legislative act, the policy is not a bill of attainder because it does not "inflict punishment" within the meaning of the bill of attainder clause.

> In deciding whether a statute inflicts forbidden punishment, [the United States Supreme Court] ha[s] recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 852 (1984).

The military policy pertaining to homosexuality does not fall within the historical meaning of legislative punishment. At common law, bills of attainder traditionally imposed the death penalty, imprisonment, banishment, and the punitive confiscation of property. Selective Service System, 468 U.S. at 852. In Alberico, the court considered whether an amendment to AR 635-100, enabling the Secretary of the Army to

relieve convicted felons from the Army on an expedited basis, was a bill of attainder. In holding that the amendment was not a bill of attainder, the court noted that the amendment did not involve any of the several punishments the Supreme court has referenced as being historically associated with bills of attainder. Alberico, 783 F.2d at 1028.

Viewed in terms of the type and severity of the burdens imposed, the regulation before us can reasonably be said to further nonpunitive purposes. As AR 635-100, ¶ 5-50a states:

> Homosexuality is incompatible with military service, The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of these officers adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among officers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of officers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain officers of the Armed Forces; to maintain the public

acceptability of military service; and to prevent breaches of security.

The policy is not concerned with somehow singling out homosexuals for punishment. Furthermore, with respect to the third inquiry articulated in Selective Service System, 468 U.S. at 851 the history behind the policy does not "evince an intent to punish' homosexuals. Indeed, the Tenth Circuit has observed that maintaining the discipline and morale of the armed forces is a compelling governmental interest. See Rich v. Sec. of the Army, 735 F.2d 1220 (10th Cir. 1984).

We conclude that the military policy regarding homosexuals is not a bill of attainder.

For all the reasons discussed, the court concludes that plaintiff has failed to satisfy the requirements for the granting of a preliminary injunction. This order denying plaintiff's motion for a preliminary injunction is immediately appealable to the Court of Appeals pursuant to 28 U.S.C. 1292. Inasmuch as the constitutional questions involved are of substantial public interest, the court in its discretion deems it appropriate to preserve the status quo of this case in the event plaintiff desires to appeal. See Fed. R. Civ. P. 62(c). Accordingly, the restraining order previously entered shall remain in effect for a period of sixty (60) days from the date of this order so that plaintiff may file her notice of appeal and

request the Court of Appeals for a stay pending appeal, See Fed, R, App, P, 4(a) (1) and 8(a).

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary injunction (Doc. #19) is denied, The restraining order previously entered shall remain in effect for a period of sixty (60) days from the date of this order so that plaintiff may file her notice of appeal and request the Court of Appeals for a stay pending appeal.

Dated this 15th day of October, 1993, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR
United States District Judge

****

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOYCE L. WALMER,	)	FILED 5/5/95
Plaintiff-Appellant	)	Ralph L.
	)	DeLoach, Clerk
	)	
v.	)	
	)	No. 93-3377
UNITED STATES DEPT.	)	(D.C. No.
OF DEFENSE AND DEPT.	)	93-2015-EEO
OF THE ARMY,	)	
Defendants-Appellees.	)	

JUDGMENT
Entered April 4, 1995

Before BALDOCK, McKAY, and EBEL, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by Counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

PATRICK FISHER, Clerk
By /s/ L. Balzano
Deputy Clerk

****

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOYCE L. WALMER,	)	FILED 4/4/95
	)	
Plaintiff-Appellant	)	Patrick Fisher
	)	Clerk
	)	
	)	NO. 93.3377
vs.	)	
	)	
UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 93-2015-EEO)

Jeffrey L. Baxter (Jeffrey E. Goering with him on the brief), of Chapman, Waters & Baxter, Leavenworth, Kansas, for Plaintiff-Appellant.

Michael A. Vatis, Attorney, Department of Justice, Washington, D.C., (Frank W. Hunger, Assistant Attorney General, Randall K.

Rathbun, United States Attorney, Anthony J. Steinmeyer, Attorney, Robert A. Van Kirk, Attorney, Department of Justice, Washington, D.C., LTC. Nolon J. Benson, Jr., Of Counsel, CPT. Tara O. Hawk, Of Counsel, United States Army, Arlington, Virginia on the brief), for Defendants-Appellees.

Before BALDOCK, McKAY, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Joyce L. Walmer appeals the district court's denial of her motion for a preliminary injunction. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a) (1) and we affirm.

Plaintiff has served in the United States Army since 1979, and held the rank of major at the time of the discharge proceedings at issue here. In January 1992, Ms. Pamela O'Brien informed the Army that she and plaintiff had been involved in a homosexual relationship while plaintiff was in the Army. The Army's Criminal Investigation Unit investigated the allegations pursuant to Army Regulation ("AR") 635-100 ¶ 5-16. Based on the investigation, Lieutenant General Shoffner, The Commanding General at Fort Leavenworth, initiated discharge proceedings against Plaintiff.

Subsequently, General Shoffner issued a memorandum to Plaintiff requesting her "to show cause for retention on active duty under the provisions for [sic] paragraph 5-11a(6) and (8), AR 635-100 because of misconduct, moral or professional dereliction." The memorandum informed plaintiff that the discharge proceedings were based on: (1) homosexual acts between 1983 and 1991; (2) knowingly marrying a person of the same sex; (3) use of marijuana; and (4) conduct unbecoming an officer.

Pursuant to AR 635-100, Plaintiff elected to appear before a Board of Inquiry (BOI) and submit rebuttal in lieu of resignation or discharge. Both military and civilian counsel represented plaintiff during the BOI proceedings. The government presented its case through stipulations of fact and expected testimony. Plaintiff, her military and civilian counsel, and the government's representative reviewed and signed the stipulations submitted by the government. Specifically, Plaintiff acknowledged that she had in the past engaged in homosexual acts with Ms. O'Brien, and that she did not qualify for an exception to the provision which requires mandatory separation for an officer who engages in homosexual acts set forth in AR 635 -100 ¶5-56[1]

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[1] Plaintiff expressly acknowledged the truth of the following facts set forth in Government Exhibit # 9, Stipulation of Fact:

During the BOI hearing, the president of the BOI determined on the record that the Plaintiff had read and discussed the stipulation with counsel before signing it. Additionally, Plaintiff stated to the president that she knew she was admitting she had performed homosexual acts by signing the stipulation, and that the BOI would be required to recommend a discharge under AR 635-100 ¶ 5-56. At the conclusion of the hearing, the president of the BOI found that plaintiff had committed homosexual acts based

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1. That on 12 January 1992, Pamela O'Brien reported to the Army that MAJ Joyce L. Walmer and Pamela o'Brien had engaged in a homosexual relationshiP. MAJ Joyce L. Walmer admitS in that she has in the past engaged in homosexual acts with Ms. O'Brien.

. . .

3. That MAJ Joyce L. Walmer does not satisfy the criteria in paragraphs 5-51a(1) through (5), AR 635-100, and is not entitled to an exception to the mandatory separation of an officer for homosexual acts as set out in the cited paragraph and paragraph 5-56, AR 635-100.

. . .

5. That MS. O'Brien made other allegations of misconduct as mentioned in the initiation of the elimination memorandum. However, there is no evidence presented regarding these other allegations, these other allegations were not referred to this Board, and will play no part in these proceedings.

Aplt. App. at 27.

upon the evidence presented, and recommended that the Army honorably discharge her.

On December 3, 1992, a Board of Review reviewed the BOI's action and recommended that the Army honorably discharge Plaintiff. On December 22, 1992, the Office of the Secretary of the Army reviewed and approved the BOI's recommendation, and scheduled January 14, 1993 as Plaintiff's discharge date.

Shortly before her discharge, Plaintiff filed a complaint in the district court against Defendants, alleging violations of the Fifth Amendment to the U.S. Constitution, and Article I, Section 9 of the U.S. Constitution.[2] Additionally, Plaintiff sought a temporary restraining order to restrain Defendants from separating her from the Army. Subsequently, the district court granted Plaintiff's motion for a temporary restraining order, and later extended it five times.

On March 3, 1993, Plaintiff filed the instant motion for a preliminary injunction pending the resolution of a jury trial on the merits. In support of her motion for preliminary injunction, Plaintiff alleged: () AR 635-100 impermissibly discriminates against homosexuals in violation of the Equal

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[2] Plaintiff also asserted in her complaint that the Army's Discharge procedure violated the Administrative Procedure Act. Plaintiff abandoned this claim, however, at the hearing on her motion for preliminary injunction.

Protection Clause of the Fourteenth Amendment, applicable against the United States under the Due Process clause of the Fifth Amendment to the U.S. Constitution, and (2) AR 635-100 constitutes a bill of attainder in violation of Article I, Section 9 of the U.S. Constitution.

On October 15, 1993, the district court issued an order denying Plaintiff's motion for a preliminary injunction on the grounds she was unlikely to success on the merits. See Walmer v. U.S. Dep't of Defense, 835 F. Supp. 1307, 1315-1316 (D. Kan. 1993). Specifically, the district court ruled that Plaintiff's equal protection challenge to AR 635-100 was foreclosed under Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).[3] Additionally, the district court held that AR 635-100 did not constitute a bill of attainder because it: (1) was not a legislative act but a military policy promulgated by the executive branch, and (2) did not inflict punishment within the meaning of the bill of attainder clause. Thus, the district court concluded that Plaintiff had failed to demonstrate that she had a likelihood of success on the merits of her equal protection and bill of attainder

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[3]In Rich, we rejected an equal protection challenge to the military policy requiring discharge of homosexuals. Rich, 735 F.2d at 1229.

challenges to AR 635-100.[4] Consequently, the district court denied Plaintiff's motion for a preliminary injunction. However, the district court ordered that the temporary restraining order previously entered would remain in effect for sixty days so that Plaintiff could file a notice of appeal and seek a stay pending appeal. Walmer, 835 F. Supp. at 1316. This appeal followed.[5]

On appeal, Plaintiff contends the district court erred by denying her motion for a preliminary injunction. Specifically, Plaintiff argues the district court erred by (1) relying on Rich to conclude her equal protection challenge to AR 635-100 lacked merit, and (2) ruling that AR 635-100 was not a bill of attainder.

(We review a district court's grant or denial of a preliminary injunction for abuse of discretion." Oil, Chemical & Atomic Workers Int'l v. Amoco Oil, 885 F.2d 697, 703 (10th Cir. 1989). Our review requires that we

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[4]Because the district court concluded that Plaintiff failed to establish that she had a likelihood of success on the merits, it did not address whether she had satisfied the other mandatory requirements for obtaining a preliminary injunction.

[5] On December 10, 1993 Plaintiff filed a motion for a stay pending appeal which we granted on December 14, 1993. Subsequently, we continued the stay on April 26, 1994 until further order of this court.

examine whether the district court committed an error of law or relied on clearly erroneous fact findings. See Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1270 (10th Cir.), cert. denied, 488 U.S. 908 (1988).

In order to obtain preliminary injunction relief, the moving party must establish:

(1) the movant will suffer irreparable injury unless the injunction issues;

(2) The threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;

(3) that the injunction, if issued, would not be adverse to the public interest; and

(4) substantial likelihood that the movant will succeed on the merits.

Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980); see also SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991). We have adopted a modified likelihood of success requirement in the Tenth Circuit. See City of Chanute v. Kansas Gas and Elec. Co., 754 F.2d 310, 314 (10th Cir. 1985). If the movant has satisfied the first three requirements for a preliminary injunction, the movant may establish likelihood of success by showing questions going to the merits so serious, substantial, difficult and doubtful,

as to make the issues ripe for litigation and deserving of more deliberate investigation.[6] Id.

Plaintiff first contends the district court erred by relying on Rich to conclude she had failed to demonstrate a likelihood of success on the merits of her equal protection challenge to AR 635-100. Specifically, Plaintiff maintains that the district court should not have held that Rich foreclosed her equal protection challenge, but should have adopted the active rational basis review set forth in Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) which requires the Army to establish on the record a rational basis to justify AR 635-100. We disagree.

In Rich, we rejected an equal protection challenge to the Army's policy of discharging homosexuals and concluded that homosexuality did not constitute a suspect classification. Rich, 735 F.2d at 1299. Further, we held that "even if heightened scrutiny were required in reviewing the Army Regulations because they restrict a fundamental right, the classification is valid in light of the Army's demonstration of a compelling governmental interest in maintaining the discipline and

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[6]We assume Plaintiff has met the first three requirements for a preliminary injunction only for purposes of our inquiry into whether she has satisfied our modified likelihood of success standard.

morale of the armed forces." Id. (citations omitted); see also Jantz V. Muci, 976 F.2d 623, 630 (10th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993) (reaffirming Rich and holding that classifications which disparately affect homosexuals require rational basis review).

We conclude the district court did not commit an error of law or an abuse of discretion in ruling that Plaintiff failed to establish a likelihood of success on the merits of her equal protection challenge to AR 635-100. The district court ruled that "whether we should apply the active rational basis test or the traditional rational basis test need not be decided. Under either test, plaintiff cannot prevail because of Tenth Circuit precedent, which is binding on this court." Walmer, 835 F. Supp. at 1313. Specifically, we ruled in Rich that a compelling governmental interest support the military policy requiring discharge of homosexuals.[7] Rich, 735 F.2d at 1229.

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[7]In Rich, the military discharged the plaintiff pursuant to AR 635-200 for fraudulently denying his homosexuality in response to questions during his enlistment process. Rich, 735 F.2d at 1223. This regulation "permits dismissal for fraudulent entry which is defined as the procurement of entry 'through any deliberate material misrepresentation, omission, or concealment which if known, might have resulted in rejection.'" Id. (quoting AR 635-200 ch. 14 ¶ 14-5 (1973)).

On this record, Plaintiff has failed to put on any evidence of a change in military policy, or in the relationship between the military policy and its legitimate objectives which would distinguish Plaintiff's case from Rich. While Plaintiff will have the opportunity to develop such a factual record at trial, the district court correctly concluded that she has not done so here. In light of Rich, the district court did not err by refusing to apply Pruitt to require the Army to demonstrate on the record a rational basis to support AR 635-100. Thus, we conclude that the district court did not err by ruling that Plaintiff had not shown questions going to the merits so serious, substantial, difficult, and doubtful as to make her equal protection attack on AR 635-100 ripe for litigation and deserving of more deliberate investigation. See City of Chanute, 754 F.2d at 314.

Plaintiff next contends that the district court erred by ruling that she had failed to demonstrate a likelihood of success on the merits of her claim that AR 635-100 amounts to an unconstitutional bill of attainder under Article I, Section 9 of the U.S. Constitution. We disagree.

Article I, Section 9 provides, "[n]o Bill of Attainder ... shall be passed." U.S. Const. art. I, §9, cl. 3. A bill of attainder is "'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the

protections of a judicial trial.'" Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 846-47 (1984) (emphasis added) (quoting Nixon v. Administrator of Gen. Servs., 533 U.S. 425, 468 (1977); see also United States v. Patzer, 15 F.3d 934, 942 (10th Cir. 1993). The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies. See Korte v. Office of Personnel Management, 797 F.2d 967, 972 (Fed. Cir. 1986) ("The clause is a limitation on the authority of the legislative branch ... [not] the executive branch."); Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967) ("[T]he fact that [regulatory documents] were not legislative acts deprives them of status as bills of attainder int he constitutional sense."); cf. Dehainaut v. Pena, 32 F.3d 1066, 1070-71 (7th Cir. 1994) (noting that "the Supreme Court has not directly ruled either way on the applicability of the attainder ban to actions of executive and administrative agencies, and an argument can be made for analyzing each case functionally rather than structurally").

In the instant case, the district court ruled that the military policy on homosexuality embodied in AR 635-100 was not a legislative act "but rather a compilation of Army Regulations implementing Department of Defense Directives." Walmer, 835 F. Supp. at 1314. Thus, the district court held that AR

635-100 was not a bill of attainder because it was not a legislative act.

Plaintiff has failed to argue on appeal that AR 635-100 is a legislative act. Rather, Plaintiff contends "that traditional analysis should be dissolved," Aplt's Brief at 17, and we should find the regulatory actions of the military subject to the bill of attainder constraint of Article I, Section 9. Because this is a novel contention that has not been adopted in this Circuit, we agree that the district court correctly determined that Plaintiff had not established a likelihood of success on the merits of her bill of attainder challenge to AR 635-100.[8] because she failed to show questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. See City of Chanute, 754 F.2d at 314.

Based upon our review of the relevant law and the record, we conclude the district court did not abuse its discretion or commit an error of law in determining that Plaintiff had failed to establish a likelihood of success on

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[8]Because we conclude that the district court correctly found that Plaintiff was unlikely to successfully advance her argument that the Bill of Attainder Clause applies to non-legislative acts, we do not address the district court's ruling that AR 635-100 did not inflict punishment within the meaning of Article I, Section 9 of the U.S. Constitution.

the merits in support of her equal protection and bill of attainder challenges to AR 635-100. Accordingly, we AFFIRM the district court's denial of Plaintiff's motion for a preliminary injunction and dissolve the

stay pending appeal which was previously entered by this court.

AFFIRMED.

****

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOYCE L. WALMER,	)	
Plaintiff-Appellant	)	
	)	
v.	)	
	)	No. 93-3377
UNITED STATES DEPT.	)	(D.C. No.
OF DEFENSE AND DEPT.	)	93-2015-EEO
OF THE ARMY,	)	
Defendants-Appellees.	)	

ORDER
Entered April 25, 1995

Before BALDOCK, McKAY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35 (b), Federal Rules of Appelate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedures, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk
By /s/ L. Balzano
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 11 1995

No. 95-230

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOYCE L. WALMER, PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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FRANK W. HUNGER
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QUESTION PRESENTED

Petitioner, an Army officer, was honorably discharged based upon her stipulation that she had committed homosexual acts, including acts punishable as criminal sodomy under the Uniform Code of Military Justice (10 U.S.C. 925), in violation of the Army's former regulation governing homosexual acts. The question presented is whether, in seeking a preliminary injunction to prevent her discharge, petitioner failed to demonstrate a likelihood of success on her claim that her discharge violated the equal protection guarantee of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-230

JOYCE L. WALMER, PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30a-43a) is reported at 52 F.3d 851. The opinion of the district court (Pet. App. 2a-28a) is reported at 835 F. Supp. 1307.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on April 4, 1995. A petition for rehearing was denied on April 25, 1995. Pet. App. 43a-44a. The petition for a writ of certiorari was filed on July 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1992, petitioner was a major in the United States Army stationed at Fort Leavenworth, Kansas. At that time, a civilian woman told the Army that she and petitioner had had a homosexual relationship while petitioner was in the Army. Pet. App. 3a. After investigating that allegation, the Army began proceedings to discharge petitioner under Army Regulation (AR) 635-100 for engaging in homosexual acts. *Id.* at 3a-4a.[1] The version of AR 635-100 then in effect required separation of any officer who "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," subject to exceptions that petitioner stipulated (*id.* at 5a) do not apply in this case.[2]

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[1] After the administrative proceedings ended in this case, Congress enacted the current policy regarding military service by homosexuals. See 10 U.S.C. 654. As petitioner concedes (Pet. 14), the current policy is not at issue in this case.

[2] AR 635-100 § XIV ¶ 5-51*a* provided in pertinent part that "[a]n officer shall be separated" if he or she "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that—

> (1) Such conduct is a departure from the officer's usual and customary behavior.
>
> (2) Such conduct under all circumstances is unlikely to recur because it was solely the result of immaturity, intoxication, coercion, or a desire to avoid military service.
>
> (3) Such conduct was not accomplished by use of force, coercion, or intimidation by the officer during a period of military service.
>
> (4) Under the particular circumstances of the case, the officer's continued presence in the service as an officer of

Petitioner elected to appear at a hearing before an Army Board of Inquiry, where she was represented by both military and civilian counsel. Pet. App. 5a. At the hearing, the government introduced a stipulation of fact signed by petitioner, her counsel, and government counsel. *Ibid.* In it, petitioner "admit[ted] that she has in the past engaged in homosexual acts with" the woman who reported their relationship. *Ibid.* Before admitting the stipulation into evidence, the Board determined that petitioner had read and discussed the stipulation with her counsel before signing it and that she wished to enter into it. *Id.* at 6a. The government also introduced an exhibit describing the expected testimony of the woman who had reported having a homosexual relationship with petitioner. Admin. Rec. 55. In that exhibit, the parties stipulated (*ibid.*) that the woman would have testified that she and petitioner had, over an extended period of time, engaged in homosexual acts, including acts that constitute criminal sodomy under the Uniform Code of Military Justice (see 10 U.S.C. 925; *United States* v. *Harris*, 8 M.J. 52 (CMA 1979)). Petitioner stated at the hearing that "she had read and discussed [this exhibit] with her counsel, that she agreed with the content of [the] exhibit and that she agreed to the admission and use of the stipulations [in

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the Army is consistent with the interest of the Army in proper discipline, good order, and morale.

(5) The officer does not desire to engage in or intend to engage in homosexual acts."

Pet. App. 6a-7a. The term "[h]omosexual acts" was defined as "[b]odily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." AR 635-100, Glossary.

the exhibit] by the board." Admin. Rec. 35-36. The Board admitted the exhibit. *Id.* at 36.

Based upon the record, the Board found that petitioner had engaged in homosexual acts, and it recommended that she be honorably discharged. Pet. App. 1a-2a. That recommendation was approved by an Army Board of Review and by the Office of the Secretary of the Army. *Id.* at 8a-9a.

2. On the date scheduled for her discharge, petitioner filed this action in the United States District Court for the District of Kansas, seeking to enjoin her discharge on the ground, *inter alia*, that it violated the equal protection component of the Fifth Amendment. Pet. App. 9a.[3] The district court entered a temporary restraining order, which was extended with the consent of the parties, requiring the retention of petitioner on active duty.

The district court later denied petitioner's motion for a preliminary injunction on the ground that she was unlikely to succeed on the merits of her challenge to the discharge. Pet. App. 2a-28a. Petitioner had urged the court to review her equal protection challenge under the "active" rational-basis test articulated in *Pruitt* v. *Cheney*, 963 F.2d 1160, 1165 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992). Pet. App. 15a-17a. The government argued for the rational-basis standard enunciated in *Heller* v. *Doe*,

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[3] Petitioner also alleged that her discharge violated the Administrative Procedure Act, the Bill of Attainder Clause, and the First Amendment. In moving for a preliminary injunction, she relied only on her equal protection and bill-of-attainder claims. Pet. App. 9a, 34a-35a. The courts below rejected both claims. *Id.* at 22a-27a, 40a-42a. In this Court, petitioner raises only the equal protection claim.

113 S. Ct. 2637 (1993). Pet. App. 17a-18a. The district court held (*id.* 20a-21a) that, "under either test," petitioner's equal protection claim was foreclosed by the Tenth Circuit's decision in *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (1984). The court explained that the Tenth Circuit in *Rich* had "held that even if heightened scrutiny were required, the [former military] regulations [governing the service of homosexuals] * * * were nonetheless valid in that they satisfied a compelling governmental interest in maintaining the discipline and morale of the armed forces." Pet. App. 20a.

3. Tne court of appeals affirmed the denial of petitioner's motion for a preliminary injunction. Pet. App. 30a-43a. It held that, in light of *Rich*, petitioner had not shown that she was likely to succeed on the merits of her equal protection claim, or even that there were "serious, substantial, difficult and doubtful" questions on the merits of that claim. *Id.* at 37a-40a.[4]

ARGUMENT

The courts below correctly held that petitioner has not shown a likelihood of success on her equal protection challenge to her discharge from the Army for engaging in homosexual acts. That holding does not conflict with any decision of this Court, and it accords with the decisions of the four other courts of appeals that have reviewed equal protection challenges in this setting. Two additional factors counsel against further review: This case is in an interlocutory posture,

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[4] On September 25, 1995, Justice Breyer denied petitioner's application for a stay of her discharge.

and it concerns the former, not the current, policy regarding military service by homosexuals.

1. The decision below accords with those of the four other circuits that have reviewed, and uniformly rejected, equal protection challenges to the former military policy. *Steffan* v. *Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1477-1478 (9th Cir. 1994); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1397, 1398 (D.C. Cir. 1984). Those courts agree, moreover, that the standard of review applicable in the special military context is the rational-basis test. *Steffan* v. *Perry*, 41 F.3d at 684 n.3; *Meinhold* v. *Department of Defense*, 34 F.3d at 1478; *Ben-Shalom* v. *Marsh*, 881 F.2d at 464; *Woodward* v. *United States*, 871 F.2d at 1076; *Dronenburg* v. *Zech*, 741 F.2d at 1398.

Petitioner argues (Pet. 20-21) that the Ninth Circuit has applied a more stringent rational-basis test than did the Tenth Circuit in *Rich* and this case. Petitioner bases that argument on the Ninth Circuit's decision in *Pruitt* v. *Cheney*, 963 F.2d 1160, cert. denied, 113 S. Ct. 655 (1992), which enunciated an "active" rational-basis test. Petitioner's argument is incorrect. The Tenth Circuit in *Rich* held that the former military policy survived an equal protection challenge "even if heightened scrutiny were required." 735 F.2d at 1229. The Tenth Circuit reiterated that holding in this case. Pet. App. 39a; see also *id.* at 20a-21a (district court decision). Thus, the Tenth Circuit has made clear that, even under the

more stringent standard of equal protection review enunciated in *Pruitt*, it would uphold discharges in circumstances such as those presented here. Thus, petitioner cannot establish a conflict between the judgment below and the Ninth Circuit's decision in *Pruitt*.

Moreover, *Pruitt* conflicts with this Court's later decision in *Heller* v. *Doe*, 113 S. Ct. 2637 (1993).[5] And, significantly, the most recent Ninth Circuit decision reviewing a discharge under the former policy correctly applied the rational-basis test set forth in *Heller*, not the test set forth in *Pruitt*. See *Meinhold* v. *Department of Defense*, 34 F.3d at 1478. Thus, it does not appear that *Pruitt* represents the law of the Ninth Circuit.

The courts below were correct in holding that petitioner failed to demonstrate a likelihood of success in challenging her discharge on equal protection grounds. Petitioner stipulated to engaging in homosexual acts, including acts that constitute criminal sodomy under 10 U.S.C. 925. See pp. 3-4, *supra*. Petitioner does not challenge the validity of the criminal statute proscribing sodomy. Thus, the present record would have provided a valid basis for

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[5] *Pruitt* held that "the government [had the burden] to establish on the record that its policy has a rational basis." 963 F.2d at 1166. In contrast, this Court in *Heller* held that under rational-basis review, the government "has no obligation to produce evidence to sustain the rationality" of the classification. 113 S. Ct. at 2643. *Pruitt* relied upon *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), as imposing a more rigorous "active" standard. 963 F.2d at 1165-1166. *Heller*, however, makes clear that *Cleburne* did not "purport to apply a different standard of rational-basis" review. 113 S. Ct. at 2643.

prosecuting petitioner under a provision the validity of which she does not dispute. *A fortiori*, it furnished a rational basis for her discharge.[6]

2. The interlocutory posture of this case also weighs against further review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993). The courts below held that petitioner was unlikely to succeed on the merits of her equal protection claim. Thus, neither the merits of that claim nor the standard under which it should be reviewed is squarely presented by the current petition. Rather, the only question that can properly be presented concerns the application of the likelihood-of-success standard on the present record. That case-specific question does not merit this Court's review.

3. Finally, the prospective importance of the decision below is reduced because this case arises under the military's former policy regarding military service by homosexuals. To be sure, the present statutory policy generally continues the former regulatory policy mandating discharge for homosexual acts.[7] The text of the present statute,

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[6] Moreover, petitioner cannot meet the other requirements for a preliminary injunction. She cannot show that such an injunction is necessary to avoid irreparable injury (see *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974)); that it would not harm the military's interest; and that it would be in the public interest. See 10 U.S.C. 654(a), 654(b)(1); *Goldman* v. *Weinberger*, 475 U.S. 503, 507-509 (1986); *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981).

[7] The present policy provides:

however, is not identical to that of the former regulation (compare 10 U.S.C. 654(b)(1) (n.7, *supra*) with AR 635-100 § XIV ¶ 5-51*a* (n.2, *supra*)), and the language of the two policies differs in other respects, such as in the definition of "homosexual act" (compare 10 U.S.C. 654(f)(3) with AR 635-100, Glossary (n.2, *supra*)).

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

10 U.S.C. 654(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995